Filed 9/19/06 Leflore v. Los Angeles County MTA CA2/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

RUDOLPHUS LEFLORE, Plaintiff and Appellant, v. LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AGENCY et al., Defendants and Respondents.	B184654 (Los Angeles County Super. Ct. No. BC299472)

APPEAL from an order of the Superior Court of Los Angeles County, Paul Gutman, Judge. Affirmed.

Gieleghem Law Office and Neil Gieleghem; Gray & Associates and Nancy E. Gray for Plaintiff and Appellant.

Raymond G. Fortner, Jr., County Counsel and Nedra Jenkins, Senior Deputy County Counsel for Defendants and Respondents.

Plaintiff and cross-defendant Rudolphus Leflore (LeFlore) appeals from an order denying his special motion to strike three causes of action in a cross-complaint filed against him by defendants and cross-complainants Los Angeles County Metropolitan Transportation Authority, a public entity, and Public Transportation Services Corporation, a non-profit corporation (MTA and PTSC, respectively, and together, cross-complainants). The special motion to strike was filed under Code of Civil Procedure section 425.16 (§ 425.16), California's anti-SLAPP (Strategic Lawsuit Against Public Participation) legislation.[1]

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[1] Section 425.16 was enacted because of a "disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances [and because] it is in the public interest to encourage continued participation in matters of public significance, and . . . this participation should not be chilled through abuse of the judicial process." (§ 425.16, subd. (a).)

Section 425.16 further provides: "A cause of action against a person *arising from* any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (*Id*. subd. (b)(1), italics added.)

When ruling on a special motion to strike, "the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." (§ 425.16, subd. (b)(2).)

Section 425.16 addresses causes of action that arise from acts taken by the defendant "in furtherance of the [defendant's] right of petition or free speech under the United States or California Constitution. in connection with a public issue." (§ 425.16, subd. (b)(1).) Subdivision (e) of that statute explains that the phrase " 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' includes (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum

We find case law and the record support the trial court's ruling and we will affirm it.

PROCEDURAL AND FACTUAL BACKGROUND

LeFlore is a former employee of one or both of the cross-complainants (the allegations in the various pleadings are not consistent), who was laid off from that employment, apparently in late 2002. His job responsibilities were in the area of oversight of procurement contracts, to ensure the contracts comply with federal regulations.[2]

After he was laid off he filed two lawsuits against cross-complainants. The first suit was filed in July 2003 (BC299472). In the first amended complaint in that suit, LeFlore alleges discrimination and retaliation in violation of California's Fair Employment and Housing Act (Gov. Code, § 12900 et seq.), retaliation in violation of Labor Code section 1102.5, wrongful discharge in violation of the Fair Employment and Housing Act and Labor Code section 1102.5, and wrongful discharge in violation of the due process and equal protection rights afforded by California's Constitution. That first amended complaint was filed in September 2004. LeFlore's second suit against

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in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest."

[2] The cross-complaint alleges that PTSC is a nonprofit corporation established by the MTA, and that LeFlore "was employed with PTSC as a Director of Contract Administration (Procurement Compliance) in [MTA's] Procurement Department." Cross-complainants' respondents' brief in this appeal states PTSC is a subsidiary of the MTA, and further states that plaintiff was employed by PTSC in May 1998. For our purposes here, we note that LeFlore sued both cross-complainants and he alleged he was hired "by LACMTA/PTSC."

cross-complainants, filed in January 2004 (BC309252), also alleges violations of the Fair Employment and Housing Act (failure to investigate complaints of discrimination and harassment, retaliation, and discrimination), and violation of the California Constitution's provisions for due process and equal protection of the law. The two suits were consolidated.

The cross-complainant's cross-complaint was filed in April 2005 and LeFlore's special motion to strike its first three causes of action was filed the next month. In its ruling on LeFlore's special motion to strike, the trial court determined the first cause of action in the cross-complaint should not be stricken because it is based on LeFlore's employment status and is not related to his rights of petition and free speech. The first cause of action alleges LeFlore violated Public Utilities Code section 130051.20, subdivision (b) which provides that "[a] member, alternate member, or employee of the [MTA] who has participated as a decision maker in the preparation, evaluation, award, or implementation of a contract and who leaves the [MTA] shall not, within three years of leaving the [MTA], accept employment with any company, vendor, or business entity that was awarded a contract as a result of his or her participation, evaluation, award, or implementation of that contract." The cross-complaint alleges that while LeFlore was employed by the MTA, he had decision-making authority over a contractor (Tutor-Saliba Perrini [TSP]) during the course of TSP's contract with the MTA, and TSP and MTA have been in "heated and protracted litigation" since before LeFlore was

laid off. After LeFlore was laid off, LeFlore worked with TSP "for the express purpose of assisting this contractor with its litigation against [the MTA]."[3]

The trial court determined the second and third causes of action should not be stricken because LeFlore failed to show that his conduct, as alleged in those causes of action constituted a protected activity taken in furtherance of his rights of petition and free speech. The second cause of action in the cross-complaint is labeled misappropriation of property and confidential information. It alleges LeFlore, without permission, took MTA documents (including attorney-client communications) to his home and kept them there and failed to return them after his termination. The third cause of action is labeled conversion. It alleges LeFlore used the MTA documents that he removed and kept to assist TSP in its litigation against MTA.

DISCUSSION

1. *Standard of Review*

This appeal presents the question whether section 425.16, in any of its subdivisions, is applicable to the first three causes of action in the cross-complaint. That is an issue of law which we review de novo. (*City of Long Beach v. California Citizens for Neighborhood Empowerment* (2003) 111 Cal.App.4th 302, 305.)

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[3] TSP was a contractor on the Red Line subway contract in the City of Los Angeles. LeFlore states that the litigation between TSP and the MTA is ongoing.

2. *The First Cause of Action Falls Within the Provisions of Subdivision (d) of Section 425.16*

Subdivision (a) of section 425.16 acknowledges that SLAPPs tend to intimidate and silence the opponents of the persons bringing them. In contrast, enforcement actions by state and local agencies to prosecute violations of laws have the effect of preserving order and protecting the public interest. (*City of Long Beach v. California Citizens for Neighborhood Empowerment*, *supra*, 111 Cal.App.4th at p. 308.) This difference between SLAPPs and enforcement actions prompted the court in *People v. Health Laboratories of North America, Inc*. (2001) 87 Cal.App.4th 442, 450 to observe that "[n]othing in the legislative history of section 425.16 implies that the problem the Legislature sought to rectify thereby was created by prosecutors bringing meritless enforcement actions." Thus, subdivision (d) of section 425.16 provides that "[section 425.16] *shall not apply to any enforcement action* brought in the name of the people of the State of California by the Attorney General, district attorney, or city attorney, acting as a public prosecutor." (Italics added.) Cross-complainants assert their first cause of action (for violation, by LeFlore, of Public Utilities Code section 130051.20) is governed by subdivision (d) and thus is not subject to LeFlore's special motion to strike.

Courts have held that to come within the provisions of subdivision (d), a suit can be civil, not criminal; the suit need not specifically state it is being brought in the name of the people of the State of California; and it can be brought by a county counsel as well as by the attorney general, a district attorney and a city attorney. (*City of*

Long Beach v. California Citizens for Neighborhood Empowerment, *supra*, 111 Cal.App.4th at pp. 307-309.)[4] Thus, the fact that the causes of action in the cross-complaint are in a civil suit is of no consequence to application of the provisions of section 425.16, subdivision (d) to LeFlore's special motion to strike.

Nor is it of any consequence that the cross-complainants are not the county counsel but rather other local agencies. The county counsel is their attorney and by their first cause of action in the cross-complaint, cross-complainants seek enforcement of provisions in the Public Utilities Code. The cross-complainants are essentially agents of the county counsel who is saved the trouble of filing a separate enforcement action by having enforcement of the Public Utilities Code provisions addressed in these consolidated actions.

Moreover, we do not find that the inclusion of the word "damaged" in the first cause of action a good reason to not apply the provisions of subdivision (d) here. In

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[4] There is no merit to LeFlore's assertion at oral argument in this case that the court in *City of Los Angeles v. Animal Defense League* (2006) 135 Cal.App.4th 606, 620 opined that perhaps it had gone too far in its opinion in *City of Long Beach v. California Citizens for Neighborhood Empowerment*, *supra*, 111 Cal.App.4th 302 when it addressed the breadth of the cases that come within subdivision (d)'s reach. What the *City of Los Angeles* court actually said was that *further extension* of the literal language of subdivision (d) "is unwarranted" given the Supreme Court's observation in *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 735 that the Legislature knows how to exempt suits from section 425.16.

Likewise without merit is LeFlore's contention that enforcement of section 130051.20 has to be left to an inspector general who is appointed under section 130051.28. He cites section 130615 of the Public Utilities Code to support his position. However, section 130615, subdivision (a), provides that "provisions of *this chapter* shall be enforced by the inspector general," (italics added), and whereas "this chapter" refers to chapter 6 of division 12 (county transportation commissions) of the Public Utilities Code, section 130051.20 is found in chapter 2 of division 12.

City of Long Beach v. California Citizens for Neighborhood Empowerment, *supra*, 111 Cal.App.4th at p. 307, the court stated the subdivision (d) exception would be applicable to civil enforcement actions "seeking injunctions, restitution and civil penalties, but not damages." The first cause of action seeks (1) injunctive relief to prevent LeFlore from working with TSP or any other company, vendor or business entity in which he participated as a decision maker while employed by cross-complainants, (2) disgorgement of any payments made, pending or not yet billed for work performed by LeFlore in violation of Public Utilities Code section 130051.20, (hereafter, § 130051.20, (3) damages in a sum in excess of the trial court's jurisdiction limit. Whether the latter two types of relief requested come within the realm of restitution and/or civil penalties is a matter we need not address at this time.

We reject LeFlore's contention that his involvement in the litigation between TSP and MTA does not come within the parameters of subdivision (d) of section 425.16. LeFlore stated in his declaration filed in support of his section 425.16 special motion to strike that after he was no longer employed by MTA he "was retained as a consultant by litigation counsel for TSP in the TSP/MTA Litigation." We hold it makes no difference whether it was TSP itself or TSP's attorney that hired LeFlore to help TSP with the litigation between TSP and the MTA; that the employment was

between LeFlore and TSP's litigation agent/attorney should not be permitted as a way to evade the restriction by section 130051.20.[5]

Moreover, by his declaration of what he has and has not done while working with TSP's attorney, it appears that LeFlore is attempting to set out parameters for what activities will and will not constitute a violation of section 130051.20's requirement that he not work for TSP for three years after leaving MTA employment.[6] This argument assumes a construction of section 130051.20 that relies upon LeFlore's own analysis of what does and does not constitute "employment." We are unpersuaded.

Nor are we inclined to accept LeFlore's assertion that "as far as [he] know[s], MTA never awarded any contract to TSP as a result of [his] participation, evaluation, award or implementation of that contract [and] [i]nstead, [his] involvement, if any, with TSP contracts was limited to approving Board reports as to form only, which reports may (or may not) have involved a TSP change order. A change order is not the award of a new contract[.] Indeed, a change order can only be done within the general scope

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[5] At the hearing on LeFlore's special motion to strike, the trial court asked his attorney whether it was disputed that LeFlore was a consultant to TSP and the attorney answered: "No."

[6] In his declaration, LeFlore stated that because he signed a confidentiality agreement in connection with being retained by TSP's attorney, he is not permitted to disclose "any of the details of [his] consulting work for TSP's counsel." However, he also stated that "(1) [his] communications with TSP's counsel were limited to non-confidential matters and/or documents and other information obtainable via California Public Records Act requests; (2) [he] never provided to TSP's counsel any attorney-client or other privileged communications that [he] may have received while still employed by MTA, and never revealed to TSP's counsel the content of any such privileged communications; (3) [he] never met or spoke with any of the principals of TSP; and (4) [he] never provided counsel for TSP with any non-privileged documents that [he] had obtained while employed by MTA."

of the existing, underlying contract, and does not constitute the award of a new contract." (Emphasis deleted.)

We do not read section 130051.20's language so narrowly as to preclude its application to (1) an employee of MTA whose job was to evaluate a contract's compliance with federal and state laws, or (2) the awarding of a change order (or modification) to a contract, and thus LeFlore's declaratory statement does not remove him from the parameters of section 130051.20. The appellate record shows that in support of the MTA's motion for injunctive relief to prevent LeFlore from violating section 130051.20 by working for TSP, cross-complainants submitted several MTA documents that link LeFlore, in his employment with cross-complainants, to TSP contracts with the MTA, specifically documents dealing with change orders and contract modifications for MTA-TSP contracts.

As for LeFlore's assertion that any involvement he had with TSP contracts was limited to approving "Board reports as to form only," LeFlore again relies on his own construction of section 130051.20 by defining the term "decisionmaker" in that statute to mean something that does not include himself in the decision making process. Moreover, "as to form only" tells this court nothing about what he really did concerning these "Board reports." A declaration from a Bruce Warrensford, PTSC's director of construction contract administration in the MTA's procurement department, states that Board reports and change orders on TSP contracts could not be submitted to the executive officer of procurement and material management, Lonnie Mitchell, without LeFlore's prior approval, and "LeFlore's involvement with Board Reports was not just

as to 'form' given his proactive role in determining the substantive nature of the final Board Reports, as well as his ability to delay a Board Report from going forward it [sic] he did not approve of the Board Report as drafted. There were many occasions when Board Reports and Change Orders were delayed as a result of the difficulty in obtaining LeFlore's prior approval." As part of his duties, LeFlore attended the Procurement Roundtable discussions, and the Procurement Roundtable "determined whether contracts should be approved, whether they complied with federal laws, and whether certain claims and requested Change Orders by contractors (such as TSP) should be approved." LeFlore was "heavily involved in the procedures used to close-out the Red Line construction contracts," including four contracts that are at issue in the litigation between TSP and MTA and that have not yet been closed out.[7]

In sum, the record supports cross-complainants' contention that subdivision (d) of section 425.16 applies to the first cause of action in their cross-complaint. Therefore there is no cause to strike that cause of action. "[LeFlore] cannot use section 425.16 as a shield behind which to hide from [enforcement of section 130051.20]." (*City of Long Beach v. California Citizens for Neighborhood Empowerment*, *supra*, 111 Cal.App.4th at p. 309.) As for his contention that because the trial court did not expressly determine that subdivision (d) applies to this case to require a denial of his

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[7] There are also documents showing that plaintiff was advised of a proposal to include, in future MTA contracts, a clause referencing the provisions of section 130051.20 and requiring the prospective contractor seeking business with the MTA to abide by those provisions. Thus, although knowledge of such provisions is not essential to proving a violation of section 130051.20, the record shows that plaintiff had such knowledge.

special motion to strike the first cause of action, the court must have rejected application of that subdivision, we need only observe that application of subdivision (d) to this case is a matter of our de novo review.

Nor do we find merit in his assertion that subdivision (b) of section 130051.20 violates Business and Professions Code section 16600, which provides that "[e]xcept as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void." We presume the Legislature knew of section 16600 (added to the Business and Professions Code in 1941) when it enacted section 130051.20 in 1997. Moreover, the time limit on accepting employment is not unlimited, as LeFlore asserts. It is a three-year period, beginning when the employee leaves the MTA.

2. *The Second Cause of Action Is Not Subject to a Section 425.16 Special Motion to Strike*

With the exception of the "enforcement action" provisions in subdivision (d) of section 425.16, in analyzing a section 425.16, subdivision (b) special motion to strike we employ a two-step analysis. First we determine whether LeFlore has made a threshold prima facie showing that the second cause of action arose from acts taken by him in furtherance of his right of petition or free speech within the parameters of subdivision (e) of section 425.16, that is, arose from a protected activity described by that subdivision. If such a showing is made by LeFlore, then we proceed to the second step and determine whether the cross-complainants have shown, by admissible evidence, that they have a probability of prevailing on their claims in that cause of

action; that is, we determine whether they have presented facts sufficient to make a prima facie case on their cause of action such that if the facts were proven at trial, they would support a judgment for cross-complainants on that cause of action.

We make our determinations by "consider[ing] the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." (§ 425.16, subd. (b)(2).) However, we do not weigh credibility or the evidence. We accept as true evidence that is favorable to the cross-complainants, and determine whether LeFlore's evidence defeats cross-complainants' evidence as a matter of law. If we determine the cause of action did not arise from protected activity by LeFlore, then LeFlore's motion to strike must be denied, and the burden of making a prima facie case regarding the cause of action does not shift to the cross-complainants. (*Equilon Enterprises v. Consumer Cause, Inc*. (2002) 29 Cal.4th 53, 67; *Gallimore v. State Farm Fire & Casualty Ins. Co*. (2002) 102 Cal.App.4th 1388, 1396; *Paul for Council v. Hanyecz* (2001) 85 Cal.App.4th 1356, 1364-1365, disapproved on another point in *Equilon Enterprises v. Consumer Cause, Inc*., at p. 68, fn. 5.; *HMS Capital, Inc. v. Lawyers Title Co*. (2004) 118 Cal.App.4th 204, 212.)

Regarding section 425.16, subdivision (b)'s provision that the statute protects causes of action that *arise from* acts taken in furtherance of a defendant's right of petition or free speech, the Supreme Court has made it clear that a plaintiff's cause of action does not necessarily *arise from* a defendant's section 425.16 protected activity merely because the plaintiff's suit was filed *after* the defendant engaged in that activity. (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 76-78.) "The anti-SLAPP statute

cannot be read to mean that ‘any claim asserted in an action which arguably was filed in retaliation for the exercise of speech or petition rights falls under section 425.16, whether or not the claim is *based on* conduct in exercise of those rights.’ [Citations.]” (*Id* at p. 77.) The Supreme Court said that the phrase “arising from” in section 425.16 should not be construed as meaning “in response to.” (*Ibid*.) “In short, the statutory phrase ‘cause of action . . . arising from’ means simply that the defendant’s act underlying the plaintiff’s cause of action must *itself* have been an act in furtherance of the right of petition or free speech. [Citation.]” (*Id*. at p. 78.) A cause of action may be “triggered by protected activity” but not necessarily arise from such protected activity. (*Ibid*.)

“[I]t is the principal thrust or gravaman of the plaintiff’s cause of action that determines whether the anti-SLAPP statute applies [citation], and when the allegations referring to arguably protected activity are only incidental to a cause of action based essentially on nonprotected activity, collateral allusions to protected activity should not subject the cause of action to the anti-SLAPP statute.” (*Martinez v. Metabolife Internat. Inc*. (2003) 113 Cal.App.4th 181, 188, italics deleted.) Thus, “ ‘[w]hen considering a section 425.16 motion, a court must consider the actual objective of the suit and grant the motion if the true goal is to interfere with and burden the defendant’s exercise of his free speech and petition rights. [Citations.]’ ” (*Ingels v. Westwood One Broadcasting Services, Inc*. (2005) 129 Cal.App.4th 1050, 1064, italics deleted.) If, however, the defendant (cross-defendant here) cannot show that the act underlying the cause of action comes within the protected acts set out in subdivision (e) of section 425.16, the motion

to strike will be denied. (*Gallimore v. State Farm Fire & Casualty Ins. Co*., *supra*, 102 Cal.App.4th at p. 1396.)[8]

As noted above, the second cause of action in the cross-complaint alleges that LeFlore took MTA documents to his home without permission, and when he was laid off, he failed to return the MTA documents he had wrongfully taken. The documents included, among other things, attorney-client communications between a Lonnie Mitchell, cross-complainants' executive officer of procurement, and MTA's general counsel.

As an attempt to justify retaining cross-complainants' documents, LeFlore stated in his declaration filed in support of his special motion to strike that he did not recall ever (1) signing a "confidentiality or other non-disclosure agreement" while working for MTA; (2) signing "an agreement or other document that limited [his] right to take out of the MTA workplace documents and other 'paperwork' that [he] acquired in the ordinary course of [his] activities," that he might wish to review away from his office, and he was not aware "of any articulated policy, regulation or other prohibition at MTA during [his] employment that limited [his] right to take documents out of the MTA workplace for work-related, or even personal, reasons"; (3) "sign[ing] any agreement or other document that required [him] to inform MTA, at the end of [his] employment, of any

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[8] Based on these judicial constructions of section 425.16, it is clear to this court that the mere references in the cross-complaint to MTA being "a public agency," and there being "heated and protracted litigation [between MTA and TSP]," will not bring the second and third causes of action in the cross-complainant within the parameters of section 425.16 relief, even though the litigation concerns a public construction project that led to publicized disputes between MTA and TSP, and is a matter of public interest.

such MTA documents that [he] might still have in my possession. Similarly [he is] not aware of any such articulated policy, regulation or other directive in force at MTA during [his] employment"; (4) "sign[ing] any agreement or other document that required [him] to return to MTA, at the end of [his] employment, documents that [he] had taken from the MTA workplace but still had in [his] possession. Similarly, [he is] not aware of any such document return policy in force at MTA during [his] employment."

The last three of these assertions are artfully worded, but ineffectual, statements because one only has to substitute the words "computer," "cell phone," "BlackBerry," or "DVD player" for "documents" and "paperwork" to understand that just as keeping and using computers, cell phones, BlackBerrys and DVD players belonging to one's employer after leaving employment can come within the parameters of the tort of conversion, so also can keeping and using documents and other "paperwork," and one does not need to sign anything or be informed of a work related policy against keeping such things to be found liable if this work related property is not returned. As for LeFlore's assertion he does not remember signing a "confidentiality or other non-disclosure agreement," he fails to address the question whether his position of employment with cross-complainants put him in a position to have a duty of non-disclosure and confidentiality of his employer's business even absent signing a form. The same observation is made concerning his statement that during the course of his employment with MTA, he occasionally received, in the ordinary course of business, communications/memoranda between attorneys who worked for MTA, including County Counsel, and other employees of the MTA, and to the best of his

recollection, these things were not labeled as attorney client communications or otherwise designated as confidential communications. As for his assertion that if he did receive documents that were so designated, he "treated them appropriately," he did not state what he meant by "appropriately."

LeFlore also stated he would occasionally take such documents home with him to review and use for his job with MTA. (He did not state whether he was referring to the documents labeled as confidential or attorney client communications, or the ones not so labeled.) Generally he would then discard the papers or return them to MTA for filing, but on a few occasions he "temporarily left such documents at home, either for future reference or simply because [he] had not gotten around to discarding or refiling them." When he left the MTA he "had several such documents at home [and he] subsequently provided *copies* of any such documents to the attorney who initially represented [him] in this action, and it is [LeFlore's] understanding and belief that *copies* of the same have been provided to MTA in connection with [his] discovery responses in this action." Thus, LeFlore admits he did not return to MTA the actual documents that remained at his home but rather he copied them and gave the copies to an outside person, his attorney. Moreover, he does not state he did not give the documents, or copies of the documents, to TSP or someone connected with TSP.

None of the statements made by LeFlore in his declaration has the effect of changing the fact that the gravamen of cross-complainants' second cause of action is not LeFlore's rights of speech and petition but rather his wrongful taking and keeping documents belonging to MTA. While labeled a cause of action for misappropriation of

property and confidential information, the second cause of action is essentially one for conversion. "[T]he gravaman of the tort of conversion is the deprivation of the possession or use of one's property." (*Pillsbury, Madison & Sutro v. Schectman* (1997) 55 Cal.App.4th 1279, 1286.) Here, cross-complainants simply allege that LeFlore took, without permission, MTA documents to his home and then after he was laid off he wrongfully failed to return them.

LeFlore relies on *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106 to bring himself within the parameters of section 425.16 with respect to the second cause of action. In that case, the Supreme Court stated that a defendant invoking the protection of section 425.16, subdivision (e)(1)or (2) need not show that statements he made were made to defend his own rights of speech or petition, that is, made on his own behalf. Rather, the defendant in *Briggs*, a tenant counseling group, was entitled to invoke the provisions of section 425.16 for its written and oral statements made on behalf of tenants in connection with matters under consideration by official bodies, including statements made in anticipation of litigation. Here, cross-complainants' second cause of action does not assert that LeFlore made statements to aid TSP in its litigation with MTA the way an attorney or tenant rights organization would make oral or written statements to aid their clients. Again, the second cause of action addresses only an alleged wrongful taking and keeping of MTA documents.

3. *The Third Cause of Action Is Not Subject to a Section 425.16 Special Motion to Strike*

The third cause of action alleges that after LeFlore was laid off he assisted TSP in its litigation with MTA by using the documents he wrongfully possessed and wrongfully failed to return to MTA, which included attorney-client communications between MTA's general counsel and the executive officer of procurement. LeFlore is not in the same position as an attorney or a tenant rights organization that merely makes oral or written statements in connection with an issue under review by an official proceeding or body.(§ 425.16, subd. (e)(2). Nor is he in the same position as someone who discloses his employer's confidential and privileged records to his own attorney in his litigation with the employer for wrongful termination. (*Fox Searchlight Pictures, Inc. v. Paladino* (2001) 89 Cal.App.4th 294.) Nor is this a case of someone who merely takes action in connection with a public issue or a matter of public interest. (§ 425.16, subd. (e)(4).) The third cause of action has the additional element that in assisting TSP with litigation, albeit litigation concerning a matter of public interest, LeFlore is alleged to have used, for his own economic benefit, documents belonging to MTA that he wrongfully acquired and kept.

Thus, the third cause of action alleges (1) LeFlore's wrongful disclosure of the MTA's proprietary information to his own advantage, that is, in the course of his employment, and (2) LeFlore's use of that information in a manner that on its face may

come within subdivision (e)(2) of section 425.16.[9] Courts have held that when a cause of action alleges activity that is protected and activity that is not protected, the cause of action will be subject to section 425.16 unless the protected conduct is incidental to the unprotected conduct. (*Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc*., *supra*, 129 Cal.App.4th at p. 1245.)

Here, the asserted protected conduct can reasonably be considered to be incidental to the unprotected conduct. LeFlore is alleged to have used converted documents for his own economic benefit, and arguably for the psychological benefit he receives from assisting the litigation foe of the employer who laid him off and whom he later sued. The TSP/MTA litigation is simply the forum in which LeFlore chose to peddle the documents and his inside information, and retaliate against his former employer. This is not like *Greka Integrated, Inc. v. Lowrey* (2005) 133 Cal.App.4th 1572 where the defendant former employee disclosed information about his former employer's business to his own attorney, the authorities, and in deposition and trial testimony in response to subpoenas, which the court found were protected activities under subdivision (e)(1).

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[9] Subdivision (e) (4) is not applicable to this case because it has been held that the conduct at issue in a special motion to strike must not only involve a public issue or an issue of public interest, it must also contribute to the public debate in some manner. (*Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc*. (2005) 129 Cal.App.4th 1228, 1246.) Here, based on the declaration of LeFlore, we cannot say that he has shown how his use of MTA's documents as a confidential litigation consultant contributes to the public debate. Thus, we do not find that subdivision (e)(4) could support a special motion to strike the third cause of action.

Further, even if we were to find that the protected activity of assisting with litigation was not incidental to LeFlore's alleged wrongful use of MTA documents to benefit himself economically, and that the burden of production shifted to cross-complainants to present a prima facie case that they would prevail on this cause of action, we find their burden has been met.

Based on our review of the pleadings and evidence, it would not be unwarranted for us to find an implied admission by LeFlore that he did use converted MTA documents in his position as consultant on the TSP-MTA litigation. In his declaration filed in support of his special motion to strike the first three causes of action in the cross-complaint, LeFlore stated: "my communications with TSP's counsel were limited to non-confidential matters and/or documents and other information obtainable via California Public Records Act requests." This statement does not preclude the possibility that he used MTA documents he had in his possession even though such documents might have been "obtainable" by means of a public records request, and it is not clear what constitutes a "communication." LeFlore also stated in his declaration: "I never provided to TSP's counsel any attorney-client or other privileged communications that I may have received while still employed by MTA, and never revealed to TSP's counsel the content of any such privileged communications." LeFlore's statement leaves open the possibility that he provided such things to TSP directly, or to someone else who could use it to TSP's benefit, or that he provided privileged information provided to someone else at MTA but also obtained by him. It also mentions only communications, thus leaving out other types of materials.

Additionally, LeFlore stated: "I never provided counsel for TSP with any non-privileged documents that I had obtained while employed by MTA." Similar observations can be made with respect to this statement.

Moreover, there is another reason for finding as a matter of law that subdivision (e)(2) does not protect LeFlore's alleged use of MTA's documents for his benefit. In *Pillsbury, Madison & Sutro v. Schectman*, *supra*, 55 Cal.App.4th 1279, the court held that the defendant Schectman, an attorney, was not permitted to keep, in connection with his representation of his clients in their suit against the plaintiff law firm, Pillsbury, Madison & Sutro (PM&S), personnel documents taken from PM&S. Schectman's clients were current and former employees of PM&S with employment law claims against PM&S, and the court determined the documents were wrongfully removed from PM&S and wrongfully possessed by Schectman "as the agent of whomever it was who improperly removed the documents."[10] The court recognized that permitting Schectman to keep the documents would subvert society's interest in (1) preserving private property and (2) "maintaining the jurisdiction of the courts to administer the orderly resolution of disputes [by use of the state's Civil Discovery Act of 1986 and the Evidence Code]." (*Id*. at p. 1288.) It said that "[d]iscovery in the litigation context presupposes ownership of documents will remain with whomever holds title, while allowing access to the trier of fact, and litigants, in specifically delineated legal proceedings." (*Ibid*.)

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[10] A special master appointed by the court in *Pillsbury, Madison & Sutro* found that none of the purloined documents violated the attorney-client privilege, constituted work product, or trade secrets, but some of them were intended to be confidential.

The court rejected Schectman's reliance on *FMC Corp. v. Capital Cities/ABC, Inc*. (7th Cir. 1990) 915 F.2d 300, a suit brought by a defense contractor, where the court ruled that because of First Amendment implications on the defendant's investigative journalism activities, the defendant could keep and use copies of the plaintiff's business records but it had to give the plaintiff copies of those records because plaintiff was entitled to use the records and it no longer had the original records. The *FMC* court also held the defendant's refusal to return the documents or copies of the documents constituted conversion. The *Pillsbury, Madison & Sutro* court held there was no similar First Amendment public policy exception in the case before it. (*Pillsbury, Madison & Sutro v. Schectman*, *supra*, 55 Cal.App.4th at p. 1286 [apparently, the application of section 425.16 was not raised in that case].) Thus, even though the use of the purloined PM&S documents was related to its litigation with Schectman's clients, the *Pillsbury, Madison & Sutro* court ruled that taking the documents for use in litigation and refusing to return the documents was impermissible on public policy grounds.

DISPOSITION

The order from which LeFlore has appealed is affirmed. Costs on appeal to cross-complainants.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

CROSKEY, Acting P. J.

WE CONCUR:

KITCHING, J.

ALDRICH, J.